IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 9TH APRIL 2007 / 19TH CHAITHRA 1929

AS.No. 451 of 1995()

OS.37/1988 of PRINCIPAL SUB COURT,KOLLAM
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APPELLANT IST DEFENDANT:

ERIC FARIA, SON OF GILBERT FARIA, NOW RESIDING IN HALCYON COTTAGE, PARATHARA BUNGLOW, KOVILTHOTTAM, CHAVARA.

BY ADV. SRI.K.K.JOHN

RESPONDENTS - PLAINTIFFS & DEFENDANTS:
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1. **TITUS RARIA, SON OF LASSER FARIA, RESIDING AT 47, RAMASWAMY NAGAR, KAVUNDAPALAYAM P.O., COIMBATORE - 30. (DIED)**

2. **BERTY FARIA, SON O WALTER FARIA, RESIDING IN PRINCE PLASTICS, PARATHARA, KOVILTHOTTAM CHAVARA (DIED)**

3. **ANTO FARIA, SON OF WALTER FARIA, SALES OFFICER, KALESWARA MILLS, COIMBATORE (DIED)**

4. **LENIN FAIRA, S/O. WALTER FARIA, ELECLTRICAL CONTRACTOR, THE ANEHORAGE, 94/A GENESAPURAM PODENNORE P.O., COIMBATORE - 23.**

5. **MRS. CELINE GOMES, 59 JEEVA STREET, KOTTAPPATTIL GOLDEN ROCK, THIRUCHIRAPPALLY.**

6. **MRS. SHIRLEY QUINTAL RESIDING IN 13, MARIAMMANKOVIL STREET, PONMALAI PATTI GOLDEN ROCK, THIRUCHIRAPPALLY. (DIED)**

7. **REXIE D'SOUZA, C-20/1945, PERUMPADAPPU, PALLURUTHI, COCHIN - 6.**

8. MRS. SANIRA CRAUSTON, 47, K. RAMASWAMY NAGAR, KAVUNDAPALAYAM P.O., COIMBATORE - 30.

9. D. FERNANDEZ, KAILASAPURAM BHE TOWNSHIP, THIRUCHIRAPPALLY.

10. R. FERNANDEZ, HP 12/A, RAILWAY COLONY, ARKONAM.

11. MRS. E.C. THOMSON, NO.3, BEER SHOP LANE, PERAMBUR, MADRAS.

12. MRS. C. MICHALEL, NO.27, RAILWAY COLONY, MANTHOPE, PODANNUR, COIMBATORE.

13. CONEY WHITE, D/O. GILBERT FARIA, CONEY COTTAGE, NEAR PARATHARA BUNGALOW, KOVILTHOTTAM CHAVARA.

14. MRS. BERYL VAZ, RESIDING IN KDAVIL PARAMBIL, P.C. ROAD, KALOOR, KOCHI - 17.5.200

15. RODNEY QUINTAL, S/O. IDA QUINTAL, BERYL COTTAGE, KOVILTHOTTAM, CHAVARA.

16. LESTER QUINTAL, S/O. IDA QUINTAL, OPPOSITE TO 15/438, AJINIVAS, G.M. ROAD, VELLAYAMBALAM, TRIVANDRUM - 10.

17. LORANIE EMMANUAL, C/O. EMMANUAL JOSEPH, POST BOX NO.7057, MUTHAN, MUSCUT, SULTANATE OF OMAN.

18. ANNETTE AUGUSTINE, ST. JOSEPH ENGLISH MEDIUM PRIMACY SCHOOL, NAGERCOIL-1, TAMIL NADU.

19. DORAIN MARTIN, D/O. DAIZY D'CRUZ, A/369/IZ ALSTOW, RACHANDRA NAGAR, GUNTUKAL, ANDHRA PRADESHF.

20. LULOO JOHN NOW RENAMED AS LUCY BROWN, 63/A 5TH STREET, BALAKRISHNAPURAM, ADAMBAKKAM MADRAS - 68.

21. INDUS D'COUTA, B1/97, PARIS APARTMENTS 30, METTUPALAYAM ROAD, ADAMBAKKAM, MADRAS 600 0-88.

22. LOVELYN D'CRUZ, THARAMEL HOUSE, KOVILTHOTTAM CHAVARA (DIED)

23. MERTILE MOTHA,C/O. A.C. CORREYA, FLAT NO.1407 & 1408, 14TH FLOOR SHEFFIELD TOWERS, M/S. LOKHANWALA COMPLEX, VERSONA, ANDHERI WEST BOMBAY.

24. KEENY D'SOUZA, POST BOX NO.9418, DUBAI.

25. ARNOLD PERSIVAL D'CRUZ, RETIRED PROFESSOR, THARAMEL HOUSE, KOVILTHOTTAM, CHAVARA.

ADDITIONAL RESPONDENTS IMPLEADED:
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26. ADOLF PRELAL, NO.13, MARIAMMANKOVIL STREET, PONMALI, PATI, GOLDEN ROCK, THIRUCHIRAPPALLY - 4.

27. BOBBY D'CRUZ, THARAMMEL HOUSE, KOVILTHOTAM, CHAVARA.

LEGAL REPRESENTATIAVES OF THE DECEASED R6 AND R22 ARE IMPLEADED AS ADDITIONAL RESPONDENTS 26 AND 27 VIDE ORDER DATED 20.12.2006 ON C.M.P.6009

28. AUDRI FARIA, W/O. LATE TITUS FARIA, 47, RAMASWAY NAGARA, KAVUNDAPALAYAM, COIMBATORE - 30.

29. PHILLIS VAG, D/O. LATE TITUS FARIA, DO. DO.

30. AIZEL, D/O. DO. DO. DO.

31. GERI, DO. DO. DO.

32. ZANDIA, DO. DO. DO.

33. MAGGIE, DO. DO. DO.

34. ALISTER, S/O. LATE TITUS FARIA, DO. DO.

LEGAL REPRESENTATIVES OF THE DECEASED R1 ARE IMPLEADED AS ADDITIONAL RESPONDENTS 28 TO 34 VIDE ORDER DATED 20.12.2006 ON I.A. 1995/06.

35. MRS. FHERLI FARIA, W/O. LATE BERTY FARIA, RESIDING AT PRINCE PLASTICS, PARATHARA, KOVILTHOTTAM, CHAVARA.

36. PRINCE FARIA, S/O. LATE BERTY FARIA, DO. DO.

37. INAS FARIA, D/O. DO. DO. DO.

38. ANEETA FARIA, DO. DO. DO.

39. RAJ FARIA, S/O. DO. DO. DO.

LEGAL REPRESENTATIVES OF THE DECREASED R2 ARE IMPLEADED AS ADDITIONAL RESPONDENTS 35 TO 39 VIDE ORDER DATED 20.12.2006 IN I.A. NO. 1997/2006.

40. GODFREE FARIA, W/O LATE ANTO FARIA, NOW RESIDING AT MERRY LAND ANGLO INDIAN SCHOOL ROAD, VADUTHALA, ERNAKULAM.

41. GAYE FARIA, S/O. LATE ANTO FARIA,

DO. DO. DO.

LEGAL REPRESENTATIVES OF THE DECEASED R3 ARE IMPLEADED AS ADDITIONAL RESPONDENTS 40 & 41 VIDE ORDER DATED 20.12.2006 IN I.A. 1996/06.

BY ADV. SRI.P.N.RAVEENDRAN
SRI.JOHNSON GOMEZ

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 09/04/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P. NO. 3453 OF 1995 IN

A.S. NO. 451 OF 1995

CLOSED.

9.4.2007 **ID/- K. PADMANABHAN NAIR, JUDGE.**

K. PADMANABHAN NAIR, J.

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A.S. NO. 451 OF 1995

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Dated this the 9th day of April, 2007

J U D G M E N T

First defendant in a suit for partition is the appellant. Plaintiffs filed the suit for partition. Overruling the objections raised by the appellant, a preliminary decree for partition was passed. Thereafter plaintiffs filed an application for passing the final decree. The trial court appointed a Commissioner to effect partition by metes and bounds. The Commissioner inspected the property and filed a report on 15.3.1005. In the report it was stated that the prayers in the commission application were for partition of the property by metes and bounds and to demarcate the share of plaintiffs 2, 4 to 10 and 16 to 19 and defendants 12 and 13 after setting apart sufficient estate for the cost incurred by the plaintiffs as per the preliminary decree.

2. The Commissioner visited the property on 21.2.1995 at 2.00 p.m. At that time second plaintiff and first defendant were present in the suit property. The suit property is having an extent of approximately 60 cents and the property is situated at

Kovilthottam near to Kaovilthottam church. On the northern boundary of the plaint schedule property there is a road. The Commissioner filed an interim report stating that there is an old building situated in the middle of the property which occupies a large area of the suit property. The building is having 8 rooms, a hall, a portico and a separate kitchen. The said building is electrified and there is separate water connection. It was reported that the property is having approximately 150 feet road frontage. It was further reported that the second plaintiff who was present at the property at the time of inspection made a suggestion for the sale of the property in public auction and the division of the amount so received. The Commissioner further stated that if the parties are amenable, the court may consider that suggestion. He also reported that for division of the property it is essential to value the building and to measure out the properties. For valuation of the building and measuring out the properties, the assistance of an Engineer/Valuer and a Surveyor is necessary without which he may not be able to carry out the court order. So the Commissioner prayed to the court

below to issue necessary directions to the plaintiffs to provide proper assistance.

2. On receipt of the report, the learned Sub Judge passed the impugned order directing 'the Commissioner to sell the property in public auction after taking publication in the newspaper'. Challenging that part of the order, this appeal is filed.

3. Since the impugned order is to sell the suit property involved in a suit for partition, the appeal is maintainable. Extent of the property is said to be approximately 60 cents. The Commissioner has reported that there is an old building having 8 rooms, a hall, a portico and a separate kitchen. The Commissioner has not stated that it is not practicable or feasible to effect partition by metes and bounds because of the existence of the old building. It is reported that at the time of inspection of the property, the second plaintiff made such a suggestion. The Commissioner had only reported that for valuation of the building and measuring out the property the assistance of an Engineer/Valuer and Surveyor are necessary. Being a final decree

application for partition, the court below ought to have ordered the assistance of Taluk Surveyor or any competent Surveyor and an Expert to assist the Commissioner for effecting partition of the property by metes and bounds. The question of sale of the property will arise only in case it is found that the division of the property by metes and bounds is impossible. It is to be noted that the total extent of the property is approximately 60 cents. Hence the order passed by the court below directing the Commissioner to sell the properties is premature and without any factual basis and it is only to be set aside.

In the result, the appeal is allowed. The order passed by the court below is set aside. The court below shall consider and pass fresh orders in the interim report filed by the Commissioner in accordance with law. Being an old case, the court below shall take every efforts to obtain the final report from the Commissioner as expeditiously as possible. I make it clear that

I am not expressing any opinion as to whether the suit property can be divided by metes and bounds.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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A.S.NO. 451 OF 1995

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J U D G M E N T

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9TH APRIL, 2007